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BOOKER AND FANFAN DECIDED: A NEW ERA IN FEDERAL SENTENCING

On January 12, 2005, the U.S. Supreme Court decided the consolidated case of *United States v. Booker*, No. 04-104 and *United States v. Fanfan,* No. 04-105. This landmark decision will usher in a new era in federal sentencing practice and provides new opportunities in sentencing advocacy. Below are highlights of the decision. The majority decision is in two parts. The first part, written by Justice Stevens for a 5-4 majority (Scalia, Souter, Thomas and Ginsburg), finds the Guidelines violate the Sixth Amendment and are thus unconstitutional. The second part, written by Justice Breyer for a different 5-4 majority (Rehnquist, O'Connor, Kennedy and Ginsburg), remedies this finding by making the Guidelines advisory, mandating that the courts must consider the Guidelines (among other traditional factors) when rendering a sentence, and finding that appellate courts can review sentences for "reasonableness". The full opinion can be accessed at the Supreme Court's website at www.supremecourtus.gov/opinions/04pdf/04-104.pdf. Below are the highlights of the decision:

First Holding: Current Administration of the Guidelines Violates Defendants' Sixth Amendment Rights

Pursuant to 18 U.S.C. Section 3553(b), the Guidelines are mandatory, and thus create a "statutory maximum" for the purpose of *Apprendi v. New Jersey*, 530 U.S. 466 (2000). The Court applied the reasoning in *Blakely v. Washington,* and finds that "any fact (other than a prior conviction) which is necessary to support a sentence exceeding the maximum authorized by the facts established by a plea of guilty or a jury verdict must be admitted by the defendant or proved to a jury beyond a reasonable doubt." Under the current administration of the Guidelines, judges find these facts, and, thus, they are unconstitutional.

Second Holding: The Guidelines are Advisory and Sentences are Reviewable for "Unreasonableness"

Given the Court's first holding, the Court "excises" 18 U.S.C. section 3553(b)(1) and section 3742 (e) from the Sentencing Reform Act and declares the Guidelines are now "advisory." Pursuant to section 3553(a), district judges need only to "consider" the Guideline range as one of many factors, including "the need for the sentence...to provide just punishment for the offense, §3553(a)(2)(A), to afford adequate deterrence to criminal conduct, §3553(a)(2)(B), and to protect the public from the further crimes of the defendant §3553(a)(2)C)." The Sentencing Reform Act, absent the mandate of §3553(b)(1), authorizes the judge to apply his own perceptions of just punishment, deterrence and protection of the public even when these differ from the perceptions of the U.S. Sentencing Commission. The Sentencing

Reform Act continues to provide for appeals from sentencing decisions (irrespective of whether the trial judge sentences within or outside the Guidelines range) based on an "unreasonableness" standard.

The current state of federal sentencing is still uncertain. The majority in *Booker* all but invites Congress to act: "The ball now lies in Congress' court. The National Legislature is equipped to devise and install, long-term, the sentencing system compatible with the Constitution, that Congress judges best for the federal system of justice." Over the course of the next several months, Congress will grapple with its response, if any. This can include the greatly increased use of mandatory minimum sentences, or implementation of the "Bowman-fix," named for law school professor Frank Bowman who advocates removal of the upper range guidelines cap and replacement with the statutory maximum sentence. Under this scenario, the guidelines again become mandatory.

While the *Booker/FanFan* decision continues the uncertainty about federal sentencing, and that uncertainty will only be resolved over time as the courts, Congress and the U.S. Sentencing Commission act, there are ideas developing about factors to consider in representing our clients. The following are some thoughts:

- Prohibited/Discouraged Factors no longer prohibited/discouraged. The guidelines had listed a number of factors that were prohibited or discouraged at sentencing. Since the guidelines are now advisory, defense counsel should be able to raise age, education and vocational skills, mental and emotional conditions, physical condition, employment record, family ties and responsibilities, role in the offense, military, civic and charitable service, and lack of guidance as a youth to persuade a judge to give a lower sentence. See U.S.S.G. §5H1.1-§5H1.12 (Nov. 2004)

- Also, consider raising other factors, such as surrender of suppression motions, economic costs of incarceration, and other costs of conviction (such as deportation) to obtain a lower sentence.

- Get the formerly prohibited/discouraged or other persuasive factors into the Presentence Investigation Report. Since the Guidelines are advisory, there is no bar to this.

- No longer have to argue that a lesser sentence is outside of the heartland (although you may still want to) since with "advisory" Guidelines, the judge does not have to "depart" from anything.

- The Feeney Amendment, otherwise known as the Protect Act, mandating de novo review of downward departures, is no longer in effect.

- Custodial Zones on the Sentencing Table Now Advisory - If the Guidelines are "advisory", the zones on the sentencing table should also be advisory. Hence, it should be possible to get a non-custodial sentence in Zone D.
- Move to Strike or Dismiss Cases Indicted with Sentencing

Allegations. Since *Booker/Fanfan* did not engraft the Sixth Amendment right to a jury trial on the Guidelines, think about filing motions to strike the sentencing allegation language in the indictment as surplusage or dismissing the indictment altogether. A sample of such motion can be found on the Defender Services website at www.fd.org.

- In cases in which you have already pled but are awaiting sentencing, and your facts are sympathetic, you may want to try and withdraw the plea based on the Booker intervening decision. See *United States v. Ortega-Ascanio*, 376 F.3d 879 (9th Cir. 2004)(permitting withdrawal of plea in light of intervening authority)

- If the court never deviates from the Guidelines calculations, you may consider arguing that the court is sentencing under a de facto mandatory and thus unconstitutional system. In one of the first post-*Booker/Fanfan* written opinions, Judge Cassell in the District of Utah states that "the Guidelines should be followed in all but the most exceptional cases." The full opinion may be accessed at www.utd.uscourts.gov/reports/wilson/pdf.

Of special import are those cases no longer pending at the district court level – either on direct appeal or subject to collateral review. The *Booker/Fanfan* opinion clearly applies to those cases still subject to direct appeal. However, the Court warns that not every previously imposed sentence gives rise to a Sixth Amendment violation. Lower courts are instructed to employ "plain error" review, and, in drug cases, those defendants who stipulated to a specific drug quantity have already admitted to important facts used to impose sentence. In addition, the Fourth Circuit's holding in *United States v. Hammoud*, 381 F.3d 316 (4th Cir. 2004), will affect cases on direct appeal. The Fourth Circuit exhibited impressive foresight when ruling last year that district courts should impose dual sentences – one under the guidelines and one under §3553, as if the guidelines were inapplicable.

Finally, the *Booker/Fanfan* opinion never addresses whether its holding applies retroactively to cases on collateral review. It remains to be seen whether the holding of *Booker/Fanfan* will apply in the §2255 context. Courts must address whether a Sixth Amendment violation, as well as a Fifth Amendment Due Process violation for being convicted and punished using less than a beyond a reasonable doubt standard of proof, can be remedied through a habeas corpus petition.

2005 DEFENDER SERVICES TRAINING EVENTS FOR CJA PANEL ATTORNEYS

Winning Strategies Series
Seattle, WA, March 31-April, 2, 2005
Minneapolis, MN, July 21-23, 2005
Philadelphia, PA, September 15-17, 2005
Contact:
Karren_Holsendorff@ao.uscourts.gov (For registration information).

The Winning Strategies seminars this year will address various areas of federal criminal practice, generally spinning off of Fourth, Fifth, and Sixth Amendment issues,

with a half day committed to federal sentencing law and practice. The seminar will feature a number of break-out sessions, to give participants a choice of topics, and allow for smaller classes. Sessions will provide innovative ideas for seasoned CJA practitioners. Newer CJA practitioners will find sessions to give them the information they need to build an effective federal practice.

Sentencing Advocacy Workshop

April 29-May 1, 2005
Location TBD
Contact:
Karen_Holsendorff@ao.uscourts.gov (For registration information).

The Sentencing Advocacy Workshop focuses on an often neglected, yet extremely important area of practice. Since approximately 97% of federal criminal cases proceed to the sentencing phase, and the recent developments in federal sentencing law have resulted in a new sentencing landscape, participation in the Sentencing Advocacy Workshop should not be missed. The program presents a comprehensive approach to sentencing advocacy. Participants will learn a process for the development of a persuasive, fact-based sentencing theory, and the advocacy skills necessary to advance that theory in writing and during sentencing hearings. Among other subjects, presentations and demonstrations will address changes in federal sentencing law, judging at sentencing, use of a sentencing specialist, storytelling, and persuasive writing. The workshop consists of plenary sessions and small group breakouts. In the small group breakouts, participants will use a case of their own to brainstorm facts, develop a theory and theme, tell a story, and persuasively write a portion of their sentencing memo or downward departure motion.

Trial Advocacy Workshop

June 23-25, 2005
San Francisco, CA
Contact: :
Karen_Holsendorff@ao.uscourts.gov (For registration information).

The Trial Advocacy Workshop focuses on the use of courtroom technology to advance the persuasiveness of witness examination and argument skills. Participants will enhance their cross examination, direct examination, and closing argument skills by applying courtroom technology, such as Trial Director and Power Point. Since many federal courtrooms are now "wired" with the latest computer technology, and this technology has proven to be persuasive and effective, participation in the Trial Advocacy Workshop will be particularly timely. Faculty will conduct presentations and demonstrations on evidentiary issues associated with using technology, using Power Point and Trial Director in the courtroom, cross and direct examination, closing argument, among other topics. There will also be small group breakouts in which participants will apply the skills presented in the plenary sessions to the facts of the mock case with which they will be provided. Each participant will practice cross examination, direct examination, and closing argument using the Trial Director and Power Point technology.

Complex Litigation Seminar
August 18-20, 2005

Location TBD
Contact: :
Karen_Holsendorff@ao.uscourts.gov (For registration information).
These 2005 seminars for CJA panel attorneys are offered at no cost. Please use the Defender Services contacts listed above to make reservations for the upcoming seminars.

FEDERAL BUREAU OF PRISONS DISCONTINUES USE OF INTENSIVE CONFINEMENT CENTERS

Effective January 7, 2005, the Federal Bureau of Prisons will no longer accept inmates into the Intensive Confinement Center (Boot Camp) Program. The three federal facilities in Pennsylvania, Texas and California will become regular minimum security facilities in June when the last classes graduate. The Intensive Confinement Center Program was one of the few available that could result in a lower federal sentence upon completion. In addition, the program provided first-time offenders with valuable interpersonal skills and it stressed self motivation and personal responsibility. The BOP cited a "lack of cost effectiveness" to support its decision.

STAFFED FEDERAL DEFENDER OFFICE SLATED TO OPEN IN MARTINSBURG

On February 7, 2005, a staffed Federal Defender office will open at the U.S. Courthouse in Martinsburg, West Virginia. The mailing address, telephone number and facsimile number is:

Federal Public Defender Office
217 West King Street; Room 237
Martinsburg, West Virginia 25401
Phone: (304) 260-9421
Fax: (304) 3716

This Martinsburg staffed office will operate from inside the federal courthouse until permanent space is obtained in the local business district.

We are pleased to announce that Assistant Federal Public Defender Brian C. Crockett was recently hired and will work from this location. Mr. Crockett graduated from WVU Law School, he clerked at both the state and federal levels, and he was a litigation associate at Bowles Rice McDavid Graff & Love in Martinsburg.

Until further notice, CJA panel attorneys are requested to continue contacting the Clarksburg Defender Office with any concerns relating to CJA Appointments. All case related rotational appointments will issue from that location. Please call either Administrative Officer Eugene Weekley or Legal Secretary Lisa Coleman at (304) 622-3823.

STAFFED FEDERAL DEFENDER OFFICE IN WHEELING DELAYED

Due to GSA construction delays, the opening of the staffed Federal Defender Office in Wheeling will be postponed until late March of this year. Upon completion, this Defender Office will operate from the second floor inside the federal courthouse.

NEW ACCESS TO FEDERAL CRIMINAL LAW BLOGS

A new feature was recently added to the Defender Services website at www.fd.org This link will provide you with access to federal law blogs that contain

timely information about federal criminal law developments. The features are broken down by Circuit, and provide detailed information about cutting edge issues. This site is certainly worth a regular visit.

FOURTH CIRCUIT ROUND-UP OF NOTABLE CASES

United States v. Dickey-Bey, – F.3d –, 2004 WL 2998787, 4th Cir. (Md.), 12/29/04.

- Warrantless arrest of defendant outside Mail Boxes Etc. after his pickup of sealed package containing cocaine; police search defendant's vehicle about 30 feet away.
- Court finds police had probable cause to believe defendant knowingly possessed cocaine.
- Court further finds police had independent probable cause to believe that defendant's automobile was being used as an instrumentality of crime to support its search.

United States v. Ickes, – F.3d –, 2005 WL 14907, 4th Cir. (Va.), 1/4/05.
-Term "cargo" under 19 U.S.C. §1581(a) allows border search of computer and disks found in vehicle that contain evidence relating to child pornography.
- No First Amendment expressive materials exception to Fourth Amendment border search doctrine.

Unpublished Cases:

United States v. Beard, 2005 WL 32831 4th Cir. (Va.), 1/7/05.

- Detailed factual analysis used to overturn district court's suppression order; district court erred in finding defendant was "in custody" before *Miranda* warnings necessary.

United States v. Husband, 2005 WL 44942 4th Cir. (Va.), 1/11/05

- Defendant pleads guilty to eight counts of sexual exploitation of a minor; district court imposes 87-months for each count *consecutively* for a total of 696 months.
- Court finds no violations of Rule 11or Sentencing Guidelines.